

SIFMA's Compliance & Legal Society Annual Seminar
Prepared Remarks of U.S. Attorney Preet Bharara
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Thank you, Scott, for that introduction. It is really an honor to be with you for the second year in a row.

Much of the curriculum of any legal conference of this nature is focused, as it should be, on promoting mastery of the law and the particular rules that make up the specialized field that the conference covers.

That is good. It is important to spend time this way.

But it is important from time to time, also, to acknowledge the limitations of those same rules and regulations—even if they were expertly drafted and wisely promulgated.

We spend a considerable amount of time in the U.S. Attorney's Office, as you would expect, training our Assistants in the rules of evidence, the rules of disclosure, in all of the ethical rules. But, at the end of the day, that is not nearly enough.

It is not nearly enough in an office like mine for prosecutors to be schooled in the applicable legal rules, if they are not also mentored to be wise and just in the enforcement of the law. The way to the wise and just exercise of discretion is not spelled out in any definitive text that I am aware of.

Good judgment requires constant cultivation and effort—in the face of countless unique and non-repeating fact patterns. It is always less a function of memorizing particular rules than it is a function of internalizing basic principles.

And, I submit, it is also not enough for a financial institution, or any business organization for that matter, merely to hold training sessions and distribute power points and circulate compliance rules.

These all have their place, but I hope and trust that you always resist the temptation to take too much comfort from the written rules that you or your companies might, from time to time, send forth.

Nothing that is circulated by email can be completely relied upon to make its way into the bloodstream of the flesh-and-blood employees that you rely upon to police their own precincts at the company.

I often say that the best-conceived compliance policies and practices in the world will be too weak to stave off scandal if the core principles are not internalized, if there is not—from the top—a daily drumbeat for integrity.

Consider a passage from a speech by Learned Hand, in which he said something perhaps unexpected for someone in his line of work. In a speech in New York in 1944, he said:

“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court, can save it.”

Now, that’s what Learned Hand said about our written *Constitution*, even as amended—the founding document of our democracy; a charter that has been the model for scores of liberty-seeking nations throughout the world; created by the likes of Madison and Hamilton.

And even so, he said, “these are false hopes.”

Now, let me ask you . . . how does your firm’s written compliance program measure up?

And so we in this room should also worry—worry that we sometimes rest our own hopes too much upon compliance programs and codes of conduct, too much upon regulations and rules.

Like liberty, integrity also lies in the hearts of men and women; and when it dies there, no code provision or compliance program can save it.

That is not to say that these should be thrown overboard or that we shouldn’t seek to improve and update them—any more than Learned Hand would ever advocate jettisoning the Constitution or abolishing the courts.

It is to say only that there is more to this project than the cold and hard letters of statutes and rules and policies.

Against this backdrop, I’d like to address two things this morning:

1. The role and plight of corporate employees as would-be whistleblowers
2. And the role and plight of corporate counsel as would-be gatekeepers

The Whistleblower

Let me talk first about the whistleblower issue. Now, “whistleblower” has become a bit of a term of art—but I am speaking very fundamentally here.

I think we in this room can all stipulate that securities fraud is bad; accounting fraud is bad; tax fraud is bad; stealing from customers is bad; ponzi schemes are bad.

Those crimes are bad, of course, for the victims, who suffer the greatest harm; but they are bad, also, for the otherwise law-abiding company that employs the malefactor.

That is so because, as you all know, even a single rogue miscreant can torpedo the fittest firm. Even the mere investigation of a corporation can be devastating.

Because of this fact of corporate existence, many intelligent people both in and out of government have expended tremendous energy to figure out how to guarantee an early-warning system, how to ensure that (to coin a phrase) people who see something, say something—so that problems can be addressed when they are yet molehills, rather than mountains.

And that is why legislators have included provisions in the False Claims Act and in Sarbanes-Oxley and in Dodd-Frank and in other laws to incentivize those who see something to say something.

In an ideal world, of course, there would be no need for such incentives. But we live in an imperfect world where human beings act, well, like human beings.

And so, in fact, each of the laws I mentioned and every other rule and regulation that has ever sought to promote and protect whistle-blowing and the early detection of corporate malfeasance is a reflection of the difficulty of human dissent in the face of more powerful forces.

Don't get me wrong. These statutory tools are important, vitally important. But the incentives they create—carrots and sticks both—are all too often no match for the human condition.

Because the lesson of history generally—and of corporate scandal specifically—is that you cannot legislate a culture of integrity. You cannot will it into existence simply by wishing for it. Nor can you install it in the workplace with even the best-drafted compliance policy or the most thoughtful statutory regime.

More specifically, you cannot—simply by issuing periodic and formalistic admonitions—always rely on even good people in the workplace to come forward the moment they suspect the books are being cooked or the numbers are being faked or the customers are being cheated.

That is a sad fact, but it is a fact of life.

There is all too often a human tendency to look the other way.

A human tendency not to want to rock the boat.

A human tendency to conform, to get along, to be a team player.

There is the human desire to avoid the ostracism that comes from speaking out; the desire to avoid being branded a troublemaker, or worse, a traitor.

People will sometimes go a long way to suppress many fine and courageous impulses, and they will make many bad choices, to avoid the scorn of their colleagues and superiors.

And when coupled with the more pragmatic concerns of maintaining job security and putting food on the table, these social forces can easily—and seemingly almost always do—overwhelm the initial impulse to do the right thing.

The compulsion to conformity and the impulse to obedience tend to silence all but the most intrepid whistleblower.

Just consider the 1960's-era experiments of Stanley Milgram—who himself was astonished that ordinary people would, under the mundane conditions of an academic experiment, blithely subject other human beings to tremendous pain by personally administering what they believed were high-voltage shocks. Why? Because a man in a lab coat told them to.

Among other things, Professor Milgram wrote this almost 50 years ago: “This is, perhaps, the most fundamental lesson of our study: ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process.”

That is the dispiriting consequence of all of these forces—and the phenomenon of silence when what is called for is high-decibel speech should intensely occupy the attention of everyone in this room.

The question is as simple as this: How to create a culture in which good people say something or do something when they see bad conduct?

And in which others will act when the whistle is blown—because, after all, it doesn't matter how loud the whistle is blown if the players on the field are deaf. . . or have chosen to wear ear plugs.

This question has been a central one in my own mind as I have made the rounds at the major business schools in the Northeast over the past year.

I've gone to NYU, Columbia, Wharton, Harvard Business School, and the Yale School of Management.

When I go, I say that this is not a scared straight program for future criminals.

And, I say, I am not there to address the tiny number of people in the room who will commit significant securities fraud at some point—though you know who you are.

This always gets a laugh.

But I am addressing myself to the vast majority of good people in that room who will be populating the precincts of the top companies and financial institutions in the world—people who are ethical and honorable.

And I address myself to them because I want them to say something when they see something.

There would be less corporate crime, and less painful consequence arising from the crime that does occur, if more people said something early on—rather than remained silent or looked the other way.

History teaches that we are far more confident about our courage to speak up in time of crisis than we have any reasonable right to be.

That was true in Milgram experiments.

And it was true more recently at Penn State.

The single most common question I get at business schools is this: What do I do if I get a bad feeling about something going on?

Students ask it plaintively, and I know in some cases they have particular episodes they are thinking about. It is not an abstraction.

And lest anyone believe this is a problem only in the minds of unformed students, consider the following:

Consider the Galleon Group, Bernard Madoff's firm, or any one of a number of cases where there were many, many good people; but many people knew or suspected that something was going on; and they did nothing—for years.

Consider Deepwater Horizon, the BP facility that exploded, killing workers and depositing so much oil into the Gulf of Mexico.

According to a front-page New York Times story, Deepwater Horizon employees said they often saw unsafe behaviors but only about half of the workers interviewed reported feeling that they could report actions leading to a potentially 'risky' situation without reprisal.

The long-term solution for every firm lies in creating a corporate culture in which dissent is openly permitted; candor is duly fostered; and integrity is cultivated and even rewarded.

That, of course, is easier said than done. It is not something that happens in an instant—and a corrupt corporate culture cannot be magically transformed overnight, even with the adoption of ever-improving policies and programs and training sessions.

The project is long term, and it requires constant care and feeding.

One place firms might begin, however, is with their hiring practices.

I wonder how many financial firms and business organizations openly and notoriously screen—not just for intellect and energy—but also for ethics and integrity.

I saw an article online a couple of weeks ago that I want to mention, which may be a bit unfair, but I mention it for what it's worth [www.thefiscaltimes.com: *Can You Ace a Wall Street Interview? 10 Sample Questions* (Feb. 24, 2012)].

These are actual questions – some were logic questions and there were some questions about finance, but also these:

How would you fight a bear?

How would you kill a giraffe?

Nothing about ethics or integrity.

The story reminded me of what a student told me after one business school talk last year—he had gone to interview after interview with financial firms and *only one* asked any question that suggested it cared about his ethics and integrity or that indicated that it cared about its own reputation for ethics and integrity.

And yet it is a recurring phenomenon for courts and commentators to inevitably express tremendous surprise—when a longstanding fraud or scandal finally comes to light—that no one sounded the alarm, even though there were legions of people in a position to do so.

Listen to Judge Sporkin, of D.C. District Court writing this in an opinion arising out of the savings and loan crisis:

Judge Sporkin, Lincoln Savings & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990): “Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?”

But he went on; he didn't stop with corporate insiders:

“Where also,” he wrote, “were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.”

The Role of the Lawyer

That leads me to my second point this morning—the role of the lawyer as gatekeeper.

In my view, the lawyer's role—either as outside counsel, the chief legal officer, or as a compliance official—is central to the establishment of a culture of integrity at any institution.

It is up to people like you in this room to help keep your clients honest and honorable.

But the role of the lawyer—like the role of the whistleblower—has also often been under assault.

There are those who still resist the notion of the in-house counsel or compliance officer as Gatekeeper of the company's ethics and Gatekeeper to ferret out malfeasance.

This, by the way, comes even after Sarbanes-Oxley explicitly—through Section 307—codified many duties of the inside lawyer.

So what is the source of that assault and what are its underpinnings?

There is substantial literature on the issue of whether lawyers should serve as gatekeepers.

First, there are those who argue that the idea of lawyers as gatekeepers is naïve; that the characterization of lawyers as officers of the court is largely disingenuous.

As Professor Geoffrey Hazard has noted:

“Corporate lawyers cannot be distinctly more virtuous than the corporate management by which they are employed.”

He suggests also that such a role is impractical and specifically refers to the inadequacy of programs and policies: there are senior officers, he writes, who “do not care about complying with the law or who feel that they cannot afford to do so. Many of them will not hesitate in firing a lawyer who gives them a hard time and then bad-mouthing them afterward. No system of rules can eliminate that risk.”

Another legal scholar, Robert Gordon, has argued that it is possible for lawyers to “assist corporate managers to inflict enormous damage and then argue, often plausibly, that they are only doing the job they are supposed to.”

Second, there are others who suggest that in-house lawyers are too beholden to the company to serve as effective gatekeepers of our securities markets. And there may be some truth to that in some cases.

Yes, sometimes lawyers are duped; there is no doubt about that. But sometimes they have worn blinders; they have failed to ask harder questions; they have failed to penetrate a clear façade; they have failed to question an obvious fabrication.

The lawyer who wishes to serve as gatekeeper also faces opposition and non-cooperation from the rank and file—who, like a dysfunctional police department, might look upon the gatekeeper lawyer as the nightmarish analogue of the dreaded Internal Affairs Bureau.

And finally, there is the skepticism that arises, unfortunately, from the lack of faith in our profession generally.

The not-absurd question is this: why on earth, given the sorry state of the legal profession and its standing, should attorneys be given exalted status and outsized responsibility and respect when it comes to corporate culture, conduct, and reform?

In the popular culture, lawyers are, after all, seen as pariahs not saviors.

Recently there was a review in the WSJ of a new book about the proper role of lawyers as Chief Legal Officers of corporations—Indispensable Counsel.

The reviewer—while acknowledging that lawyers serve some function—looks askance at what he characterizes as the Chief Legal Officer serving as “tattletale” and “spy.”

It is a measure of how far we have fallen as a profession that he writes, with some amount of snark, that “it is somewhat treacherous ground to assert that lawyers operate on a higher plane.”

In my view, he misses the point: lawyers *should* operate on a higher plane in a counsel capacity; it is the ideal to which we should all aspire.

And we should gladly tread that treacherous ground.

It is true, as Professors Gilson and Coffee write, that clients want “champions” not “chaperones.”

Lawyers should not act the part of insufferable snitch or scold or finger-wagger.

But the celebrated Elihu Root was perhaps on to something when he said that “half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”

But the question still presents itself: what is the proper gatekeeping role, if any, for the trusted counselor to a business organization? Is she but another business executive at the firm?

Timothy Sullivan, the former President of the College of William and Mary, seems to answer that question this way: “I yield to no one in my admiration for the liberating power of the free market, but the practice of law is not the same as the practice of capitalism.”

He is onto something, too, I think. Notwithstanding how far from favor our profession may have fallen, the ideal is intact.

Former college president Sullivan, like so many others, has lamented the disappearance of the lawyer-statesman in the grand tradition. And what he and others say about that vanishing model is, I think, worth bearing in mind as you consider—and safeguard—your proper gate-keeping role when you leave this conference and go back to your desks.

He harkens back to the lawyerly ideal of the learned counselor who is more than a “legal technician,” who is more than a “sophisticated artisan,” who provides more than specific legal advice, but rather offers practical wisdom.

As Sullivan said, “The point is that to be learned means to be broadly and to be deeply educated—not just in techniques—but in values; not just in the narrow knowledge of high specialization, but in the complex and the powerful forces that shape civilization and govern human conduct.”

It may seem a bit grandiose and even quaint and anachronistic, this view of the learned lawyer as a wise gatekeeper in the business world.

But I don’t think so.

If you look around the room, you realize that the institutions you represent collectively employ millions of people; they boast billions of dollars in profits; and they manage trillions of dollars in funds.

Entire markets and economies can rise (or fall) on the conduct (or misconduct) of the firms you represent.

And so I think it is neither grandiose nor utopian to hope that the bar that tends to the financial lifeblood of the planet aspires to more than being “legal technicians.”

Especially when the difficult forces at play require so much more than the mere interpretation of legal rules and regimes, but—as I discussed earlier—matters of psychology and power, conformity and collective behavior—in other words, “the complex and powerful forces that shape civilization and govern human conduct.”

In these circumstances, what we need are great lawyers in the grand tradition, which is what I know you in this room all aspire to be.

Let me conclude by saying this: Given the breadth of participation at this meeting, given the range of institutions represented, and given the law of averages—it is virtually certain that bad things are brewing at some of your institutions, right now, even as we kick off this well-intentioned conference in Miami.

By the way, I think I see some of you nodding—you guys are *definitely* getting subpoenas.

But, in seriousness, it is no doubt true:

- Even as we speak, there are books being cooked;
- Even as we speak, there is a company executive somewhere who is peddling inside information;
- Even as we speak, someone is deliberately overvaluing an asset or understating a debt;
- Even as we speak, there is a board of directors being kept in the dark about a whistleblower’s complaint; and

- Even as we speak, there is some scandal being swept under the rug.

Now, some of this conduct will come to light in the next year, some the year after, some perhaps never.

People like those in my office may even be able to prosecute some of it.

But some of it will come to light too late—and in the intervening delay, evidence will be lost; fortunes will be squandered; accounts will be dissipated; and statutes of limitations will run.

And a question will be asked—the kind of question that Judge Sporkin asked in his opinion in connection with the savings and loan crisis:

“Where . . . were the outside accountants and attorneys when these transactions were effectuated?”

“Why did not at least one professional blow the whistle to stop the overreaching that took place in this case?”

And so the question for you all is this:

- What more are you in this room going to do when this conference is over and you go back to your desks?
- How will you satisfy yourself that the institution you advise is a place where people are comfortable elevating ethical issues?
- That it is a place where protections for blowing the whistle are not just in the company manual, but in the company’s marrow?
- How will you ensure that the rank and file take their ethical obligations seriously? How will you *test* your belief that they do?
- What will you do when an executive tries to put you off?
- What will you say the next time you think a whistleblower complaint has been only shallowly investigated?
- How will you react if you ever begin to get the feeling that the client is not telling you everything? Will you simply readjust your blinders, as some scholars say is your professional right? Or will you demand entry into the circle of trust? And if not accepted, will you think to exit noisily?
- What will you do when a firm comes to you for an opinion that it is desperate for when you learn five other reputable law firms refused to provide it?

I have great hope and optimism today. Why is that?

To paraphrase Learned Hand once more, integrity lies in the hearts of men and women. And because I know it lies in the hearts of the men and women in this room, I am supremely optimistic about our future and about our country.

Thank you.